88-939 (3)

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

IN RE: KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen, deceased, pursuant to the laws of the Federal Republic of Germany

EDGARDO L. PARUNGAO,
Petitioner,

v.

KLAUS HUBERT GOERG,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF OF DR. BRUNO M. KUBLER, AS AMICUS CURIAE SUPPORTING THE PETITION FOR WRIT OF CERTIORARI

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MOTION OF DR. BRUNO M. KUBLER FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Dr. Bruno M. Kubler, Trustee in Bankruptcy for Westaufbau GmBH and

Westaufbau Grundbesitzanlagen GmBH & Company KG, pursuant to Rule 36.1, hereby moves for leave to file the attached brief amicus curiae supporting the petition for writ of certiorari. Consent to file the brief has been obtained from the Petitioner, and the letter expressing such consent has been filed with the Clerk of this Court. The Respondent has not consented; therefore, this motion is necessary.

The background and concerns of the amicus are set forth in the Interest of Amicus Curiae section of the attached brief. In sum, the amicus is a trustee in bankruptcy appointed pursuant to the laws of the Federal Republic of Germany, to administer the assets of the two aforedescribed West German corporations,

whose assets include claims of more than $40 million against the Estate of Heinz Guenter Kaussen (deceased). Respondent is the Trustee in Bankruptcy of the Kaussen Estate in Germany.

The amicus urges that the decision of the Eleventh Circuit directing the Bankruptcy Court to entertain Respondent's petition pursuant to 11 U.S.C. Section 304 is erroneous. Goerg v. Parungao (In re Goerg), 844 F.2d 1562 (11th Cir. 1988) (Opinion reproduced in Petitioner's Appendix at page 1a). The amicus, as a foreign bankruptcy trustee and a major creditor of the Kaussen Estate, brings a different perspective to this case and presents issues of conflicts, statutory interpretation and administration not

previously raised.

Accordingly, the amicus respectfully seeks the Court's leave to file the attached brief supporting the petition for certiorari.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a case in the United States Bankruptcy Courts pursuant to 11 U.S.C. Section 304 may be commenced on behalf of an entity that is ineligible to be a debtor under 11 U.S.C. Sections 101(12) and 109(a).

2. Whether there should be an exception to the exclusive jurisdiction of a state court to administer assets of a decedent's estate located within its borders, so as to permit administration of a decedent's estate by the United States Bankruptcy Courts pursuant to 11 U.S.C. Section 304.

3. Whether assets of a decedent's estate located in California should be administered pursuant to applicable state law while assets of the same decedent located in Georgia should be administered pursuant to 11 U.S.C. Section 304.

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BRIEF OF DR. BRUNO M. KUBLER AS AMICUS CURIAE SUPPORTING THE PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of Dr. Bruno M. Kubler, Trustee in Bankruptcy for Westaufbau GmBH and Westaufbau Grundbesitzanlagen GmBH &

Company KG pursuant to the laws of the Federal Republic of Germany, in support of the petition for writ of certiorari.

INTEREST OF AMICUS CURIAE

Dr. Bruno M. Kubler, amicus, is Trustee in Bankruptcy for Westaufbau GmBH and Westaufbau Grundbesitzanlagen GmBH & Company KG, and a specialist in German and international insolvency law, having extensively published in those fields.

The amicus' interest in this case arises from his position as a trustee in bankruptcy, whose estate is owed more than $40 million by the Kaussen Estate, and as a practitioner and authority in German and international insolvency law. With foreign investments

in the United States rapidly increasing, especially in real estate, amicus believes that there will be a proliferation of situations like the instant case. A split of authority has now been created by the decision of the Eleventh Circuit with respect to whether an entity on whose behalf a case is commenced under Section 304 must be eligible as a debtor under Title 11 of the United States Code. The law must be clarified as to whether assets of a foreign decedent's estate will be administered by a probate court in the state where the decedent's property is located, or by the "expensive, time consuming, and ultimately ineffective method for seeking protection and relief in the United States" under Section 304. E. Flaschen, "Does Section 304 Work?",

page 2, paper presented at American Bar Association Annual Meeting, Toronto, Canada, August 8, 1988.

The Bankruptcy Court below observed that this case was primarily a contest between Respondent and Kaussen's heirs. In re Goerg, 64 Bankr. 321 (Bankr.N.D.Ga. 1986). (Opinion reproduced in Petitioner's Appendix at page 22a). This observation is inaccurate. Respondent's efforts to secure ancillary administration is opposed by the amicus and Petitioner, and lacks support of the American creditors, and perhaps of three German banks whose claims against the Kaussen Estate are more than $50,000,000, and who have filed claims in the Probate Court of Fulton County, Georgia ("Probate Court").

Because the Kaussen Estate is

insolvent, there will be no residual estate from which Kaussen's heirs will receive a distribution in the Probate Court. An issue remains there as to whether the four Kaussen daughters may be entitled to a years' support as provided by Georgia law. See O.C.G.A. Sections 53-5-1, et seq. and 53-7-91. This issue has been tried in the Probate Court, decided adversely to the Kaussen daughters, and is on appeal in the Georgia Courts.

The Kaussen Estate has substantial assets in California. The amicus is concerned that administration under Section 304 was denied by the Bankruptcy Court for the Northern District of California, but entertained by the Eleventh Circuit. (Opinion reproduced in Petitioner's Appendix at

page 36a). This conflict has the anomalous result that Kaussen assets in California will be distributed by the probate court in California, and the assets in Georgia will be distributed pursuant to Section 304. In the event administration under Section 304 results in the removal of Georgia assets to Germany, the distribution of the assets will change drastically. The Georgia assets will pay priority German tax claims which are in excess of $20 million. These foreign tax claims would be neither payable nor recoverable in the Probate Court because the United States does not recognize foreign tax laws. Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979).

The Eleventh Circuit decision was characterized as displaying "[A] remarkable degree of receptivity to foreign representatives." A. Glosband and C. Katucki, "Section 304 of the United States Bankruptcy Code: Cases Ancillary to Foreign Proceedings," page 24, paper presented at American Bar Association Annual Meeting, Toronto, Canada, August 8, 1988. Perhaps it is anachronistic that amicus, himself a foreign representative, is urging this Court to apply the historical precedent of distribution pursuant to state law in connection with decedents estates, but amicus believes that the advantages of precedent outweigh the uncertainties under Section 304.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS COURT, OTHER LOWER FEDERAL COURTS, A FINAL ORDER WITH RESPECT TO RESPONDENT FROM THE BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, AND IS CONTRARY TO LAW.

Pursuant to 28 U.S.C. Section 1410(a) and (b), when a case under Section 304 is commenced to enjoin state court proceedings and require turnover of property, the case may be commenced only in the district court for the district in which such state court sits and where such property is located. Thus, separate cases under Section 304 must be filed in each district where such actions are pending and property exists. 1 Collier on Bankruptcy, Paragraph 3.02 at 3-143 (15th Ed. 1988). The assets of the Kaussen Estate, consisting primarily of

real estate, are located in both Georgia and California. Accordingly, Respondent filed petitions to commence cases pursuant to Section 304 in the Bankruptcy Courts for both the Northern District of Georgia and Northern District of California. In separate opinions, the California and Georgia Bankruptcy Courts dismissed Respondent's petitions on the ground that a decedent's estate is ineligible to be a debtor under the Bankruptcy Code.

Although Respondent appealed the Georgia decision, no appeal was taken from the California decision. On appeal, the District Court for the Northern District of Georgia affirmed the decision (Opinion reproduced in Petitioner's Appendix at page 15a). The Eleventh Circuit reversed.

The decision of the Eleventh Circuit not only conflicts with the California decision, but also with decisions from Bankruptcy Courts in the Second Circuit holding that in order to commence a case under Section 304, the petitioning entity must be eligible as a debtor under 11 U.S.C. Section 109(a). In re Lines, 81 Bankr. 267 (Bankr. S.D.N.Y. 1988); In re Metzler, 78 Bankr. 674 (Bankr. S.D.N.Y. 1987); In re Gee, 53 B.R. 891 (Bankr. S.D.N.Y. 1985).

11 U.S.C. Section 101(35) provides:

> "'person' includes individual, partnership, and corporation, but does not include a governmental unit,. . . ."

11 U.S.C. Section 109 provides:

> "(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United

> States, or a municipality, may be a debtor under this title [11 USCS Sections 101 et seq.].
>
> "(b) A person may be a debtor under chapter 7 of this title [11 USCS Sections 701 et seq.] only if such person is not -- . . .
>
> > "(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States. . . .
>
> "(d) Only a person that may be a debtor under chapter 7 of this title 11 [11 USCS Sections 701 et seq.], except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title [11 USCS Sections 1101 et seq.]."

In re Gee addressed, inter alia, the issue of whether a Cayman Island

reinsurance company was eligible to commence a Section 304 case. The Bankruptcy Court determined that because the foreign reinsurance company was a "person" under 11 U.S.C. Section 109(a), it was therefore an eligible debtor under Section 304. 53 Bankr. at 899, 900. The court determined that the exclusions in subsections (b) and (d) of 11 U.S.C. Section 109, applicable to foreign insurance companies, would not affect petitioners' eligibility under 11 U.S.C. Section 109(a). Id.

In re Lines involved a Bermuda reinsurance company which commenced a Section 304 case. The Court held:

> "Section 109(a) applies to all chapters. By their terms, Sections 109(b) and (d) only preclude certain entities, including foreign insurance companies engaged in such business in the United States, from being debtors under

> chapters 7 and 11 of the Code.
> . . .
>
> "An ancillary proceeding under Section 304 is not a Chapter 7 proceeding or a Chapter 11 proceeding; nor is it a full scale bankruptcy proceeding. Thus, sections 109(b) and (d), by their terms, simply do not apply." 81 Bankr. at 270, 271.

Furthermore, "Subsection (a) [of Section 109] establishes the criterion which must be met for an entity to be a debtor under Title 11 generally. This is the only provision dealing with who may be a debtor in a case ancillary to a foreign proceeding under Section 304." 2 Collier on Bankruptcy, Paragraph 109.01 at 109-4 (15th Ed. 1988) Since the Kaussen Estate is not a person, it follows that these cases would hold that the Kaussen Estate could not commence a Section 304 case.

Finally, amicus believes that

the principle of federalism, which includes the right of one of the states to apply its laws to the distribution of a decedent's property within its boundaries, is the reason that decedent's estates are excluded from the definition of "person," under 11 U.S.C. Section 101(35), and accordingly the definition of "debtor," under 11 U.S.C. Sections 101(12) and 109(a).

The decision of the Eleventh Circuit is also contrary to the principle that a federal court will not assume jurisdiction over, or otherwise interfere with, property in the custody of a state probate court. Markham v. Allen, 326 U.S. 263, 66 S.Ct. 296, 90 L.Ed. 256 (1945); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 30 S.Ct. 10, 54 L.Ed. 80 (1909).

If this Court does not resolve these conflicts, the Georgia assets will have an administration pursuant to Section 304 and the California assets will be administered in the probate court according to the laws of California. Either all the assets should be administered according to appropriate state law in the appropriate probate court or all the assets should be administered under Section 304.

II. THE DEFINITION OF A DEBTOR UNDER SECTIONS 303(b)(4) AND 304 SHOULD BE UNIFORM, NOT DIFFERENT AS DETERMINED BY THE ELEVENTH CIRCUIT.

Since Section 109(a) provides that only a debtor can commence a case under any section of the Code and since a decedent's estate cannot be a debtor, a foreign representative of a decedent's

estate should not be permitted to commence a case under Section 304. Nevertheless, the Eleventh Circuit directed the Bankruptcy Court to entertain Respondent's Section 304 petition on the grounds that foreign law should determine the eligibility of the foreign entity under the Code. The Eleventh Circuit qualified this eligibility standard:

> "This analysis suggests that a full bankruptcy proceeding involving a foreign debtor may be commenced only if the foreign debtor qualifies as a "debtor" under the Code. Cf. 11 U.S.C. Section 303(b)(4)(1982)." 844 F.2d at 1568 n.13; Appendix at page 14a.

11 U.S.C. Section 303(b)(4) provides:

> "An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title . . . by a foreign representative of the estate in

> a foreign proceeding concerning such person."

The Eleventh Circuit appears to hold that a foreign entity must be eligible as a debtor under the Bankruptcy Code to bring an involuntary case, although the same foreign entity need not be eligible as a debtor under the Bankruptcy Code to commence a case under Section 304 as long as the entity qualifies as a debtor under foreign law. This distinction is illogical and without support in the Code. Because the definition of a foreign proceeding in 11 U.S.C. Section 101(22) is applicable to cases under Sections 303(b)(4) and 304, Respondent should either be permitted to commence a case under both sections despite his ineligibility under Section 109(a) or be denied relief under each section.

III. THE ELEVENTH CIRCUIT FAILED TO REVIEW THE ULTIMATE PURPOSE OF SECTION 304 IN THE CONTEXT OF A PROBATE PROCEEDING.

In reviewing the intent of Congress, the Eleventh Circuit quoted from the legislative history and stated:

> "The ultimate purpose of the Section 304 mechanism is to 'prevent dismemberment by local creditors' of assets located in this country that are involved in a foreign insolvency proceeding." 844 F.2d at 1568; Appendix at page 13a.

Probate proceedings themselves in the United States prevent dismemberment by local creditors of assets located in this country and provide for a system of distribution among creditors and other parties in interest. There is no need to invoke the Bankruptcy Court's "processes and expertise to marshal property" to aid

the foreign proceeding because the creditors' rights are established by probate law. It should be noted that administration of the Kaussen Estate in Georgia began on May 30, 1985, and not until January 24, 1986 did the West German Court enter an order of adjudication finding the Kaussen Estate insolvent and appointing Respondent as bankruptcy trustee. In June, 1986, Respondent commenced his case under 11 U.S.C. Section 304. After three and one-half years and hundreds of thousands of dollars of administration expenses and costs, judicial economy demands that the system of distribution of the Probate Court be completed.

CONCLUSION

For the foregoing reasons, the amicus respectfully urges the Court to grant the Writ.

Respectfully submitted,

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